STATE OF MICHIGAN

COURT OF APPEALS

JUDITH M. BONDIE,

Plaintiff-Appellant,

v

ROBERT SALTSMAN, and NOVODYNAMICS, INC., f/k/a NONLINEAR DYNAMICS INC.,

Defendants-Appellees.

UNPUBLISHED
February 23, 2006

No. 257218
Washtenaw Circuit Court
LC No. 02-001356-CZ

Before: Wilder, P.J., and Zahra and Davis, JJ.

PER CURIAM.

Plaintiff Judith M. Bondie appeals as of right from the trial court's June 17, 2004 order granting summary disposition to defendants Robert Saltsman and NovoDynamics, Inc. pursuant to MCR 2.116(C)(10). We affirm in part and reverse in part, and remand to the trial court for proceedings consistent with this opinion.

I. Facts and Proceedings

This case arose following the October 19, 2000, termination of plaintiff's employment with defendant NonLinear Dynamics, Inc. (NDI), which later merged with NovoDynamics (formerly Catalytica Novotech) and became known as NovoDynamics, Inc. (NovoDynamics). Plaintiff and Thomas Limperis founded a high-tech startup company, later renamed NDI, in January 1997. Plaintiff was elected to NDI's Board of Directors and was appointed as Vice President of Marketing and Sales. Plaintiff received 6,400 shares of founder's stock that vested 25 percent immediately, and 25 percent over each of the next three years, and ultimately split 100 to 1.

In July 1999, plaintiff was removed from NDI's Board and forfeited 160,000 shares of her founder's stock. An August 2, 1999 letter to plaintiff from NDI Board member John P. Snedeker, confirmed these actions, and indicated that plaintiff's employment was not affected. The letter also indicated that if plaintiff agreed to forfeit her right to 160,000 shares of NDI stock and released all claims against NDI regarding her change of status, she would be reappointed as a Vice President, in addition to being an NDI employee and a holder of 480,000 shares of NDI stock. Plaintiff accepted the agreement. On August 10, 1999, NDI's Board of Directors held a special meeting to adopt a vision and strategic plan for NDI and to define the functions of its

Board members in pursuing the plan. The adopted plan included a restriction on the President's ability to dismiss an officer of the company "unless with the consent of the Board of Directors."

Defendant Saltsman became NDI's President and CEO on September 29, 2000. Saltsman terminated plaintiff's employment on October 19, 2000, after plaintiff attended a technical meeting with Catalytica Novotech that he directed her not to attend. Plaintiff admitted that Saltsman told her not to attend the meeting, but stated that she did so under an invitation from Catalytica, and under the direction of Limperis, who was responsible for managing the meetings. Plaintiff sued defendants, and claimed that NDI breached its employment agreement with her because Board consent was not obtained before her employment was terminated. She also alleged gender discrimination, claimed that Saltsman tortiously interfered with plaintiff's business opportunity, and claimed that both defendants breached an implied covenant of good faith and fair dealing.[1] The trial court granted summary disposition to defendants pursuant to MCR 2.116(C)(10), and denied plaintiff's motion for reconsideration pursuant to MCR 2.119(F)(3).

II. Standard of Review

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) may be granted where there is no genuine issue of material fact, except as to the amount of damages. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The court must consider the pleadings, affidavits, depositions, admissions, and any other evidence to determine whether a genuine issue of material fact exists to warrant trial. *Id*. We must review the record in the same manner as the trial court to determine whether the movant was entitled to a judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. Analysis

A. Wrongful Discharge

Plaintiff argues that the trial court improperly granted summary disposition to NovoDynamics because she was an officer of NDI at the time of her termination, and was wrongfully discharged because she was not terminated in accordance with the August 10, 1999 Board resolution. The August 10, 1999 Board resolution provided, in pertinent part:

> 2. Mr. Limperis, as President of NDI, will have the direct responsibility and authority for all operations of NDI, excluding only those matters vested above to the direct authority of the Chairman and subject to the following limitations:

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[1] Plaintiff withdrew her gender discrimination claim and it is not an issue of this appeal.

> (b) No Officers (including, without limitation, a Vice President—Finance or a Vice President—Marketing) may be appointed or dismissed unless with the consent of the Board of Directors[.] [8/10/99 Meeting minutes, 3.]

We conclude the record contains evidence to support a reasonable conclusion that plaintiff was an officer of NDI at the time of her termination. The August 2, 1999 letter to plaintiff begins by explaining that plaintiff's previous positions as a director and as an officer have been terminated. However, the letter then states that, "[t]hese actions, by intention do not affect your status as an employee of NDI. The letter goes on to propose that if plaintiff agreed to forfeit her right to 160,000 shares of NDI stock and release all claims against NDI regarding her change of status, she would be *reappointed* as a Vice President, in addition to being an NDI employee and a holder of 480,000 shares of NDI stock. Further, Limperis, who was a Board member at that time, confirmed that plaintiff was allowed to retain her status as an officer of NDI as part of the agreement. To the extent that the August 2, 1999 letter suggests that plaintiff was vice-president but not an officer, the subsequent resolution, which was apparently drafted by the same attorney that drafted the August 2, 1999 letter, states that, "No Officers (including, without limitation, a Vice President—Finance or a Vice President—Marketing)." This resolution tends to show that the NDI Board of Directors understood that plaintiff, a vice president of marketing, was an officer. Therefore, the record supports a reasonable conclusion that plaintiff was an officer at the time she was terminated.

Assuming plaintiff is found to be an officer of NDI at the time of her termination, we next address plaintiff's claim that defendant agreed to limit its discretion in terminating her employment by requiring the consent of the board.

It is a "fundamental proposition that parties to an employment contract are free to bind themselves to whatever termination provisions they wish." *Thomas v John Deere Corp*, 205 Mich App 91, 93-94; 517 NW2d 65 (1994). In *Thomas, supra*, this Court also noted:

> Consequently, it is somewhat misleading to talk about employment contracts as being either "at-will" or "just-cause." In some employment contracts, employers choose to retain unfettered discretion to terminate an employee's employment when doing so would not violate the law. In other employment contracts, employers agree to limit their discretion to terminate an employee's employment in some way. Employers and employees are free to bind themselves as they wish, and "at-will" and "just cause" termination provisions are merely extremes that lie on opposite ends of the continuum of possibilities. [*Id*. at 2.]

In *Rood v General Dynamics Corp*, 444 Mich 107, 138-139; 507 NW2d 591 (1993), our Supreme Court described the two steps in analyzing a legitimate expectations claim. The first step is to determine "what, if anything, the employer has promised." *Id*. at 138. A promise may be express or implied, and is defined as "'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *Id*. at 138-139, quoting Restatement Contracts, 2d, § 2(1). Specificity is required for a promise. *Id*. "The more indefinite the terms, the less likely it is that a promise has been made." *Id*.

We conclude that reasonable minds can differ in regard to whether NDI, by its August 10, 1999 Board resolution, promised plaintiff that she could not be terminated unless the Board's consent was obtained. The resolution provides a specific procedure for the appointment and dismissal of its officers. The statement was sufficiently specific to allow reasonable minds to differ as to whether there was a promise.

Second, we must also determine whether reasonable minds could differ in finding that the promise was reasonably capable of instilling a legitimate expectation that plaintiff's employment would be terminated only after the consent of the board of directors was obtained. In all claims brought under the legitimate expectations theory, "the trial court should examine employer policy statements, concerning employee discharge, if any, to determine, as a threshold matter, whether such policies are reasonably capable of being interpreted as promises of just-cause employment." *Rood, supra* at 140. If the trial court concludes that the policies are "incapable of such interpretation, then the court should dismiss the plaintiff's complaint on defendant's motion for summary disposition." *Id*. However, if the policies "are capable of two reasonable interpretations, the issue is for the jury." *Id*. at 140-141.

The resolution was passed at a special meeting of NDI's Board of Directors held in part to define the functions of the Chairman and President. An attorney memorialized the meeting in minutes in which the resolution is stated. Defendant has not claimed that the minutes misstated the content of the meeting or that the resolutions were improperly recorded. Accordingly, we cannot wholly accept defendants' claims that, for instance, the resolution only applied to Limperis, who was NDI's President at the time of its adoption. Here, we find that the resolution was reasonably capable of creating a legitimate expectation in NDI's officers, including plaintiff, that their employment was terminable only after the consent of the board of directors was obtained. Therefore, we reverse the trial court's grant of summary disposition to NovoDynamics on Count I of plaintiff's complaint, and remand for further proceedings not inconsistent with this opinion.

B. Consent of the Board

NovoDynamics argues that summary disposition was proper because Saltsman terminated plaintiff's employment with the express consent of four other Board members. MCL 450.1501 provides that "[t]he business and affairs of a corporation shall be managed by or under the direction of its board, except as otherwise provided in this act or in its articles of incorporation." NovoDynamics contends that Saltsman had majority consent of the board, which is all that is required under MCL 450.1523. MCL 450.1523(1) defines a quorum for transaction of business as "a majority of the members of the board then in office, or of the members of a committee of the board," unless otherwise provided. MCL 450.1523(2) provides that a majority vote is required to amend the bylaws of a corporation. However, NovoDynamics' argument contradicts the prevailing law that a board only acts through its formal actions. MCL 450.1523(1) further provides that "[t]he vote of the majority of members present at a meeting at which a quorum is present constitutes the action of the board," unless otherwise provided.

Additionally, it is a long-recognized policy that "[i]n the absence of statutory authority no decision or act done by any number of the board of directors while not duly assembled as a board is a valid corporate act." *Zachary v Milin*, 294 Mich 622, 624; 293 NW 770 (1940). Further, in *Zachary* at 625, our Supreme Court stated, "[t]he directors of a corporation have no authority to

act as a board of directors except at a regularly constituted meeting, in the absence of a consent in writing." Here, the record demonstrates that the Board did not meet and approve plaintiff's dismissal before it occurred, and therefore, the Board did not consent to plaintiff's termination.

C. Implied Good Faith and Fair Dealing

Plaintiff next argues that summary disposition was improper because defendants breached the covenant of good faith and fair dealing implied in every contract. However, this Court has refused to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in an employment relationship. *Barber v SMH (US), Inc.*, 202 Mich App 366, 372-373; 509 NW2d 791 (1993), citing *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992). Therefore, the trial court properly granted defendants summary disposition on this claim.

We recognize that in *Franzel v Kerr Manufacturing Co*, 234 Mich App 600, 606, 600 NW2d 66 (1999), this Court held that an employer's liability for the breach of an at-will employee agreement is limited to nominal damages. The Court reasoned that upon return to work, the employee had no expectation of continued employment because she remained an at-will employee. *Id*. at 613. Here, there remains a question of fact whether plaintiff had an expectation of continued employment until the Board of Directors consented to her termination. There was evidence presented to reasonably conclude that only after the Board's consented to plaintiff's dismissal could she be terminated for any reason pursuant to her at-will employment status.

D. Tortious Interference with Business Relationship

Plaintiff next argues that summary disposition was improper because Saltsman tortiously interfered with plaintiff's business relationship with NDI. Although plaintiff frames the issue as a tortious interference with a business relationship claim, she is actually asserting that Saltsman tortiously interfered with her employment contract. A plaintiff may maintain an action for tortious interference with an at-will employment contract. *Feaheny v Caldwell*, 175 Mich App 291, 304; 437 NW2d 358 (1989).

To maintain a tortious interference action, a plaintiff must show that the defendant was a third party to the contract or business relationship. *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986). A corporate agent is not liable for tortious interference with the corporation's contracts unless he acted solely for his own benefit with no benefit to the corporation. *Feaheny, supra* at 305-306. In an action against a corporate agent or officer, a plaintiff bears a heavy burden of showing that the defendant acted outside of the scope of his authority by interfering with the plaintiff's contractual relations without justification. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994).

Plaintiff argues that she established that she had a business relationship with NDI that could only be terminated with the consent of NDI's Board of Directors. While plaintiff has established that Saltsman did not follow the proper procedure in terminating her employment, plaintiff is unable to demonstrate that Saltsman acted solely for his own benefit. Plaintiff has presented no evidence that Saltsman terminated her employment for his own personal gain. The trial court properly granted summary disposition to defendants.

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Alton T. Davis